

CARDOZO LAW REVIEW  
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IDEOLOGY AND THE SUPREME COURT: A  
CONVERSATION WITH JUDGE RICHARD POSNER  
AND PROFESSOR ERIC SEGALL

*During the last three days of the 2012-2013 Supreme Court term, the Justices handed down decisions on affirmative action, voting rights, same-sex marriage, and corporate liability for torts and discrimination. These seven cases marked one of the busiest weeks in the history of the Court. The Justices overturned a key provision of the Voting Rights Act, struck down the Defense of Marriage Act, refused to hear the appeal of the Proposition 8 decision, overturned and remanded the Fifth Circuit's decision affirming a major affirmative action program, and made it much more difficult for plaintiffs to sue corporations for discrimination and tort injuries. The conversation below about how the Justices decide cases was triggered by the Court's decisions and is a continuation of a discussion published in the New York Review of Books in September, 2011.<sup>1</sup>*

Judge Richard Posner is a federal judge on the Seventh Circuit Court of Appeals, a prolific author of over thirty books and hundreds of articles, and one of the most important intellectuals in America today.

Professor Eric Segall is the Kathy and Lawrence Ashe Professor of Law at the Georgia State University College of Law. He has written over twenty-five law review articles on constitutional law and is the

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<sup>1</sup> Eric J. Segall, *The Court: A Talk with Judge Richard Posner*, NEW YORK REVIEW OF BOOKS, Sept. 29, 2011, <http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/>.

author of the book *Supreme Myths: Why the Supreme Court is not a Court and its Justices are not Judges*.

ES: I have written that, in seven important cases the Court decided during the last week of the 2012-2013 term, the Justices voted their personal values every time.<sup>2</sup> This shouldn't surprise anyone as the Justices are the only judges in the western world who have life tenure and virtually unreviewable power—a governmental role no person, no matter the content of their character, should be given. This authority, when combined with the vagueness of the sources of law they have to interpret (such as due process, equal protection, and freedom of speech) result in the Justices exercising their discretion in a way different in kind than any and all other judges. I have long argued that the Justices don't act like judges, meaning they don't take prior law seriously.<sup>3</sup> The last week of this year's term helped my arguments considerably.

RP: But if that's true, wouldn't you have to say that a common law court is also not a real court, that common law, like constitutional law, is not real law, because it's just made up by judges? What's the difference between making up tort law and making up constitutional law? In the latter case there's a text, but it's too old and vague to be fully directive. The logic of your position is that common law is illegitimate. Courts should not provide tort or contract remedies until legislatures enact tort or contract statutes.

Do you think that almost all constitutional decisions are lawless, and if so, are all common law decisions also lawless?

ES: I don't know if the Court's decisions are lawless, but the Justices are not acting like judges because prior law has virtually no pull. Supreme Court common law is different than state made common law (an argument you made in your book "How Judges Think," by the way).

Common law judges are generally elected—which is a difference between them and the Justices—but more importantly in many states their opinions can be overturned by the people through a majoritarian constitutional amendment process or by the legislature. Also, state law judges are never final on federal issues and they feel the tug of the Supremacy Clause, not so the Justices. I am making a psychological

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<sup>2</sup> Eric J. Segall, *The Week the Supreme Court Came Out of the Closet*, HUFFINGTON POST (July 15, 2013, 6:25 PM), [http://www.huffingtonpost.com/eric-segall/the-week-the-supreme-cour\\_b\\_3596309.html](http://www.huffingtonpost.com/eric-segall/the-week-the-supreme-cour_b_3596309.html).

<sup>3</sup> ERIC J. SEGALL, *SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES* (2012).

argument that the role of the Supreme Court in our system results in the Justices' equating what the law is with what they want it to be more than other judges. I would have thought you'd have sympathy for that position because you have written the following:

"[T]here is also a natural tendency [for judges] to try to reassure the public that judicial discretion is minimal . . . . The tendency is paradoxically most pronounced at the Supreme Court level, *the paradox being that it is the most political court.*"<sup>4</sup>

RP: I agree with what I said. But the difference is assuredly one of degree. I know a lot of judges.

ES: Well, you certainly have more experience with judges than I do.

But I would have thought that always having the very last word along with life tenure and zero political accountability might make a psychological difference and make it more difficult for a judge to act with humility and deference. And, I assumed that is more or less what you meant by your statement that the Supreme Court is more "political." Maybe the difference is a "significant" matter of degree which is very close to a matter of kind.

But I doubt you would agree with the word "significant."

RP: Lower federal court judges have life tenure and no political accountability, too, and also the last word in most cases (the Supreme Court grants cert. in slightly more than one-tenth of one percent of federal court of appeals cases). And of course all but one of the Justices are former federal court of appeals judges. Did they become different people when they were appointed to the Supreme Court? If they were well behaved legal formalists as court of appeals judges, wouldn't you expect that to persist for at least the first year or two of their Supreme Court careers?

ES: I am not saying that lower court judges or state judges are "well behaved legal formalists." That is a bit of a straw man.

I am saying that always having the final word gives Supreme Court Justices a very different job description than that of lower court judges. The recent Illinois gun case is a good example.<sup>5</sup> Illinois banned all guns in public, and if you had been on the Supreme Court, you would have

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<sup>4</sup> Jonathan Masur, *How Judges Think: A Conversation with Judge Richard Posner*, UNIVERSITY OF CHICAGO LAW SCHOOL, THE RECORD ONLINE (Spring 2008), available at [www.law.uchicago.edu/alumni/magazine/spring08/posnerhowjudgesthink](http://www.law.uchicago.edu/alumni/magazine/spring08/posnerhowjudgesthink).

<sup>5</sup> *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

upheld the ban under the Second Amendment, but you weren't, so you didn't. Were you the final decision-maker, that case comes out differently. That difference makes a big difference over time.

RP: Not “over time!” That was my point: if it were “over time” this would be consistent with your view that we lower federal judges are well behaved little pussycats. Over time the judges do change the law. True, lower-court federal judges are bound by precedents created by the Supreme Court, whereas the Supreme Court can overrule those precedents. But that's not a fundamental difference. To maintain at least minimal predictability in law and also to control caseload, Justices, like judges, have to adhere to precedent, at least for a time. They can't treat every new case as a *tabula rasa*. But this just means that law should change only gradually.

ES: I will concede one thing: you are definitely not a “pussy cat.”

RP: Also why do you say “a bit of a straw man?” Isn't your concept of a proper judge the judge who is a legal formalist? As soon as you admit legal realism, your house of cards collapses, doesn't it? A legal realist can be a proper judge, can't he be, and not just a politician in robes?

ES: The only thing that limits the Justices' power is what they think they can get away with—e.g., Chief Justice Roberts' vote to uphold the Affordable Care Act last year,<sup>6</sup> and Justice Ginsburg's vote on Proposition 8 this year.<sup>7</sup> Both were clearly motivated by concerns over backlash and legacy. Justice Ginsburg telegraphed earlier this year that she was afraid of the *Roe*-like backlash that would be caused by a Court decision overturning the laws of over thirty-five states on same-sex marriage, so she voted to dismiss the appeal in California. Many people think Roberts labeled the ACA a tax and voted to uphold it to avoid a *Bush v. Gore* type 5-4 decision along partisan lines. These concerns, which are distinctively non-legal, also distinguish the work of the Court from the work of other courts. I think the ACA and Prop 8 cases, among many others, show how the difference can be one of kind not degree.

RP: Concern with legacy is a common human trait. I don't see how that differentiates Justices from judges. Concern with backlash just means concern with the consequences of decisions. I don't see anything

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<sup>6</sup> Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

<sup>7</sup> Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

wrong with that, or again anything that distinguishes the Supreme Court from other courts, except that the Supreme Court's decisions have greater impact, therefore greater potential backlash effect.

ES: Isn't there a *space* between unrepentant formalism (no one really lives there) and complete and utter failure to explain the true basis for a decision or to really care about prior law. The two federal judges I clerked for lived in that space, I believe you live in that space, and most state court judges live in that space. I am utterly convinced Supreme Court Justices only rent that space and rarely.

Whether judges are impacted by prior law is *not*, in my opinion, a question like being pregnant or not, and I don't think judges have to choose between extreme formalism and realism.

RP: What exactly is in that *space*?

ES: You would not have been impeached had you written in the Illinois gun case that the law in *District of Columbia v. Heller* was distinguishable from a law banning all guns in public. But you choose voluntarily to follow *Heller* even though you disagree with the decision.<sup>8</sup> That's a little bit of that space.

The federal trial judge I worked for had to decide several Georgia cases where the state court of appeals had written decisions on state law claims he thought were incorrect. He followed those cases even though he didn't want to, and we could have gotten away with pernicious distinctions. That's in the space.

And, at the Eleventh Circuit, there were panel opinions my judge didn't want to follow. But, really, there was very little he could do and he followed them. That was in that space.

I do not believe any Supreme Court Justice in my lifetime ever acts in that space, unless he or she is worried about reputation or public outcry, and those concerns don't belong in that place.

RP: I don't deny that precedents of a higher court bind a lower court. That's why the lower judges don't have as much discretion as the highest ones. But they still have plenty of discretion. I don't understand your Eleventh Circuit example—a judge who hates a previous decision of his own court can try to persuade the court to overrule it.

Supreme Court Justices undoubtedly feel bound by a number of the Court's prior decisions. That's why I say we're dealing with a difference of degree rather than of kind.

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<sup>8</sup> Richard A. Posner, *In Defense of Looseness*, THE NEW REPUBLIC (Aug. 27, 2008), [www.newrepublic.com/article/books/defense-looseness](http://www.newrepublic.com/article/books/defense-looseness).

ES: In the Eleventh Circuit, at least in 1986, one panel opinion was binding on another and it was virtually impossible to convince the judges to take an *en banc* case for the purpose of reversing an old panel.

Scalia has said the 14th Amendment doesn't apply to women.<sup>9</sup> If he's willing to say that, he's willing to say anything (that he wants to).

RP: But do you think the Supreme Court on balance has made the U.S. worse off? That would be a difficult position to sustain.

ES: That is a very different question than whether they fail to act like true judges. But, I will say that I have argued for a long time that for a left-wing progressive like myself, I would gladly trade *Dred Scott*, *Plessy*, the *Civil Rights Cases*, *Lochner*, *Citizens United*, *Bakke*, *Gratz*, *Bush v. Gore*, and *Heller* (among many others) for *Brown*, *Roe*, *Lawrence*, *Windsor*, and a few free speech and religion cases.

In my view the protection of criminal defendants is a job for judges so I don't have to give them away. But abortion, affirmative action, guns, campaign finance reform, not so much.

Of course I concede we don't know what the world would look like with only minimal Thayer-type judicial review.

But I wish we could find out.

RP: I am an unrepentant legal realist. A realistic judge pays attention to precedent but to much else besides, and can be regarded as a political actor, though less so than a legislator or an executive branch official. In these respects the Supreme Court differs in degree rather than kind from other judges; it has greater freedom but also greater responsibility.

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<sup>9</sup> Jillian Rayfield, *Scalia: 14th Amendment Doesn't Protect Women Against Discrimination*, TALKING POINTS MEMO (Jan. 4, 2011, 7:23 PM), <http://talkingpointsmemo.com/dc/scalia-14th-amendment-doesn-t-protect-women-against-discrimination>.